



1 APPEARANCES: (Continued)

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1 (The following was heard in open court at  
2 10:18 a.m.)

3 THE COURT: Good morning.

4 ALL: Good morning, Your Honor.

5 THE COURT: Please be seated. We have a full  
6 agenda today for our case management conference. Thank  
7 you for your cooperative efforts in putting this agenda  
8 together.

9 I want to just note for our record who is  
10 present. Lawrence Berman, Clay Millig and Gill Gaynor,  
11 good morning, for the plaintiffs' steering committee.  
12 Christy Jones, Allison Jones, good morning. David  
13 Abernathy and Margaret O'Neil, right? I always do  
14 that, don't I? Madeline Sherry, good morning. Stephen  
15 Finley and Brandon Goodman, right?

16 ALL: Good morning, Your Honor.

17 THE COURT: And is David Buchanan available  
18 on telephone or are we calling him later?

19 MR. BERMAN: He should be listening at this  
20 point, Your Honor.

21 THE COURT: Okay.

22 MR. BERMAN: And then when the hearing  
23 concludes to move onto the other issue we've arranged  
24 for a new call in and Mr. Buchanan will be on that line  
25 and Mr. Weinkowitz is expected to be on that line as

1 well.

2 THE COURT: Perfect. So, Mr. Buchanan is on  
3 the line now?

4 MR. BERMAN: He should be, yes, Your Honor.

5 THE COURT: Okay. And is Mr. Weinkowitz on  
6 the line as well?

7 MR. BERMAN: He is, Your Honor, yes.

8 THE COURT: Okay. Very good. Okay.

9 MR. BERMAN: Of course, they are in listen  
10 only mode at this point.

11 THE COURT: Okay. Very well.

12 MR. BERMAN: Thank you.

13 THE COURT: I think it makes sense for us to  
14 address the first item on the agenda last. So, we will  
15 begin with item number two, which is the plaintiffs'  
16 steering committee letter seeking substitution of a  
17 case. Actually one of the Bellwether cases, right?  
18 Good morning, Mr. Gaynor.

19 MR. GAYNOR: Good morning, Judge. Nice to be  
20 with you this morning. Your Honor, quite simply at the  
21 outset of the Bellwether selection by the plaintiffs'  
22 steering committee I made an error in identifying one  
23 of those cases. The cases which the committee had  
24 selected were the Hague (ph) case, the Spiel (ph) case  
25 and the Hayes case. What was communicated was the

1 Blake case, the Spiel case and the Hague case.

2 When this error came to light I did contact  
3 Mr. Hughes and just to put this in context, and Mr.  
4 Hughes was very understanding, in fact, he had some  
5 very kind things to say to me which I appreciated.

6 Shortly before the date that we were to  
7 identify the Bellwether cases my mother had a stroke  
8 and it was a serious one. 87 years of age and has had  
9 dimensia for a couple of years. So, it was a major  
10 setback for us.

11 With the Tylenol work, other obligations and  
12 that basically not only filled my plate, but my plate  
13 was a bit overflowing. Mr. Hughes was very  
14 understanding and directed me to Ms. Jones, Ms. Allison  
15 Jones, as she was more in charge of the Bellwether  
16 selection than he, and offered to pass along what I had  
17 told to him.

18 So, similarly the next day I did contact Ms.  
19 Jones. She, likewise, was very courteous and very  
20 understanding. That said, she obviously had to speak  
21 with her clients and I understood as well that she  
22 would have to do as her clients directed and as they  
23 thought best.

24 So, a couple days following that the  
25 objection was filed to our replacement. So, I want to

1 go over essentially the substance of those positions.  
2 Your Honor, the first thing is that it was an  
3 inadvertent error. It was a mistake on my part.

4 It was brought to the attention, if you will,  
5 of the defendants at a point very, very early, almost  
6 pre-discovery if you will. There was a reference in  
7 their letter that they had employed a vendor to obtain  
8 records of those cases identified in the Bellwether  
9 selection process.

10 But, clearly too as was appropriate for them  
11 to do, they had already employed the vendor and  
12 obtained the records, begun review of the records and  
13 so forth in order for them to make their own selections  
14 of the Bellwether cases.

15 And according to, I think it is item four in  
16 our agenda, they had obtained roughly 80 records prior  
17 to our identification of the Bellwether cases. Whether  
18 Blake was among those or not is really not important,  
19 it is just to say that that process was begun well  
20 before April 8th.

21 Secondly, the Blake case, to the extent that  
22 time and effort and energy have been expended to obtain  
23 those records, it is not a waste. That case very well  
24 could come up in this process.

25 It is not a case to be dismissed by any

1 means, and so we would submit that those efforts, to  
2 the extent they took place before identification were  
3 not wasted efforts.

4 To that end as well, Your Honor, no  
5 depositions have yet been taken of the Bellwether  
6 plaintiffs. The letter did reference, that is, the  
7 letter from Ms. Jones, Ms. Christy Jones, that at that  
8 point they had not received dates.

9 But, again, a lot is going on and I am quite  
10 sure it was an inadvertent oversight on her part that  
11 earlier in the day we had, in fact, provided multiple  
12 dates for four of the six plaintiffs. All three of  
13 those identified by the PSC, one of the plaintiffs  
14 identified by the defense.

15 The fifth, or I will say selection number two  
16 of the defendants, it was communicated to Ms. Davidson  
17 is that plaintiff, very elderly, very poor health,  
18 wheelchair bound and was not going to be available this  
19 month or June, but perhaps later, but not at the  
20 present.

21 We also communicated that on the sixth case,  
22 and that was Mr. and Ms. Burton, which was another  
23 defense selection. While we hadn't obtained the dates  
24 at that point we felt we would soon and, in fact, we  
25 did. And the next day on the 16th we provided those

1     dates.

2                 So, five of the six plaintiffs dates have  
3     been provided but, however, those depositions have not  
4     yet been taken. Again, we would submit that that all  
5     demonstrates clearly that there is not significant harm  
6     as a result of what was my mistake.

7                 The letter also referenced that the Blake  
8     case was filed outside the statute of limitations.  
9     Once again, Your Honor, there is an awful lot going on  
10    getting ready for trial in New Jersey and so forth.  
11    And so once again I think it was completely without  
12    intent and was oversight on the part of the defense,  
13    but the Blake case had, in fact, been filed timely.

14                To put it in context, Ms -- I am sorry, Ms.  
15    Hayes was filed timely. Ms. Hayes died August of 2010  
16    in the State of Alabama. Alabama has a two-year  
17    statute of limitations. So, the statute would run in  
18    August of 2012. The claim was timely filed in the  
19    Court of Common Pleas of Philadelphia County on January  
20    12th of 2012.

21                So, consequently that claim was filed since  
22    seven plus months before the statute ran. So, again, I  
23    think it was just a matter of oversight on their part.  
24    But, collectively, Your Honor, this was very early in  
25    the process. It was an inadvertent error and mistake.



1 We would ask, as the plaintiffs' steering committee,  
2 that we be allowed to correct that mistake and  
3 substitute the Hayes case for the Blake case. Thank  
4 you.

5 THE COURT: Thank you. Ms. Jones?

6 MS. C. JONES: May I be heard just briefly,  
7 Your Honor?

8 THE COURT: Yes.

9 MS. C. JONES: Your Honor, we have responded  
10 to this request and certainly understand Mr. Gaynor's  
11 personal position and would not wish in any way to  
12 affect that or to make it any worse.

13 In short, I think this is a matter within the  
14 discretion of the Court. We filed the objection in  
15 large part for two reasons. One, because the case  
16 management order does not, in any way, provide for this  
17 type of unilateral substitution.

18 In fact, it provides very clearly that either  
19 if the case is settled or may be dismissed in the event  
20 that it is first identified. It was about five weeks  
21 after it had actually been identified as a Bellwether  
22 before we were advised of the mistake.

23 In any event, discovery will, to some extent,  
24 be delayed if there is a substitution only in order to  
25 get whatever medical records and so forth we may have

1 to get and follow up with the newly designated  
2 plaintiff.

3 The real issue, Your Honor, is that going  
4 forward that regard to what Your Honor decides to do  
5 today in terms of the substitution, and I certainly  
6 understand under the circumstances if the Court wishes  
7 to allow the substitution, but going forward,  
8 substitution at a later date is not something that is  
9 contemplated by the case management order.

10 In fact, the case management order clearly  
11 contemplates dismissal of the case in the event that  
12 the plaintiffs choose not to go forward with it. So,  
13 as much as anything, Your Honor, we think it is  
14 important that we not set a precedent here that allows  
15 unilateral substitution, particularly after discovery  
16 has been done.

17 THE COURT: Right. Okay. I think that makes  
18 sense. We have three Bellwethers on the plaintiffs'  
19 steering committee side?

20 MR. GAYNOR: Yes, Your Honor.

21 THE COURT: And two on the defense side?

22 MS. C. JONES: Three.

23 THE COURT: Okay. And you have each  
24 identified those three. There has been no issue since  
25 they've been identified?

1 MR. GAYNOR: Correct.

2 THE COURT: Okay. All right. Yes, I looked  
3 at your papers. It seems to me that we're early enough  
4 in the process that there is no dramatic prejudice. I  
5 mean, there certainly is some prejudice in that there  
6 have been efforts to identify documents.

7 You all have been working very diligently and  
8 getting to these issues as you need to, so when the  
9 Bellwether cases were identified you began the process  
10 of identifying documents.

11 I don't think we've gone so far down that  
12 road that there is prejudice through the substitution,  
13 and I certainly think there are legitimate,  
14 understandable reasons for the mistaken designation and  
15 so I will allow the substitution with the understanding  
16 that Ms. Jones' point is very well taken, that we want  
17 to stay with these Bellwether cases and now that we're  
18 in the process of discovery and I don't think there  
19 really is a system here for the unilateral  
20 substitution.

21 So, let's go forward then with the Estate of  
22 Hayes case substituting for the Estate of Blake case.

23 MR. GAYNOR: Thank you, Your Honor.

24 THE COURT: All right. And we will do an  
25 order that confirms that. Thank you for those

1 presentations. Item number three is the request from  
2 defendants for depositions of plaintiffs in Bellwether  
3 matters. Where are we with these?

4 MS. C. JONES: Your Honor, I think that's  
5 moot. We now have all of those things.

6 THE COURT: Okay. Those have been worked  
7 out. Okay. Thank you.

8 MS. C. JONES: Yes, Your Honor.

9 THE COURT: And number four, the MDL cases  
10 subject to a dispositive motion, and that's based upon  
11 the review of the plaintiff fact sheets. Wants to talk  
12 about that?

13 MS. C. JONES: Your Honor, I am not sure  
14 frankly it is ripe for action here.

15 THE COURT: Okay.

16 MS. C. JONES: It is more of an advisory type  
17 of situation.

18 THE COURT: Okay.

19 MS. C. JONES: We have, in fact, advised  
20 plaintiffs that based upon our review of the fact  
21 sheets and the medical records before plaintiffs it  
22 does not appear that there is a viable claim for one of  
23 various reasons.

24 What we would like to do, the plaintiffs have  
25 not yet responded to that, but our intent is to move

1 forward with dispositive motions on those matters, so  
2 that we can then begin to limit and streamline this MDL  
3 as to the cases that are and should be in front of it.

4 No doubt the plaintiffs may wish to -- they  
5 may concede those issues or they may ultimately wish to  
6 contest them. We just wanted to advise the Court that  
7 it is our intent to move forward with those motions.

8 THE COURT: With those motions. Okay. It  
9 seems to me that 80 motions for summary judgment or  
10 motions to -- I guess they would be motions for summary  
11 judgment at this point?

12 MS. C. JONES: These would be motions for  
13 summary judgment, but I think that we have identified  
14 specifically four to move forward on.

15 THE COURT: Right. Okay. And I am just  
16 interested in saving some time and paper on your part  
17 and ours. I mean, I guess each case would be an  
18 individual case, so you would have to brief it  
19 individually. Unless there is some -- I am  
20 contemplating maybe a motion filed and then a response  
21 from the plaintiff as to whether they really contest  
22 that motion.

23 MS. C. JONES: We would be happy to look at  
24 that, Your Honor, and see if we can do something. We  
25 actually sent the letter to plaintiff's counsel first

1 as a courtesy hoping we might be able to work something  
2 out, if they could look at them and then if it is  
3 unnecessary to file the motion, we could have a  
4 stipulation of dismissal or something.

5 THE COURT: Okay.

6 MS. C. JONES: And I think we have not yet  
7 responded or plaintiffs have not moved forward to  
8 moving on. But, if the Court is amenable to us filing  
9 a single motion we can be happy to do that. The only  
10 concern I have is that you have individual case numbers  
11 and I am concerned about the record.

12 THE COURT: Right.

13 MS. C. JONES: So, we will look to see what  
14 we can do to make it easier.

15 THE COURT: Probably in those cases where  
16 there is going to be a contested motion we should have  
17 individual motions and at least, I mean, you can  
18 incorporate certain sections of the brief in each, I  
19 guess, but I think we should probably have separate  
20 motions and briefings. Okay.

21 MS. C. JONES: Thank you, Your Honor.

22 THE COURT: Thank you. Mr. Berman?

23 MR. BERMAN: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. BERMAN: With respect to this issue, the

1     PSC and the plaintiffs would oppose embarking on some  
2     process at this point of time that would permit the  
3     defendants to begin filing dispositive motions.

4             Just to back up a bit, the letter that Ms.  
5     Jones referred to was an April 7 letter which was sent  
6     to us prior to the date on which we were to make our  
7     Bellwether selections.

8             In the letter four plaintiffs were identified  
9     and without any elaboration the letter stated we have  
10    reviewed, meaning the defendants, records and indicate  
11    at best these plaintiffs did not suffer an injury from  
12    a Tylenol product. Given the lack of connection to  
13    these defendants we requested you voluntarily dismiss  
14    these plaintiffs without delay. So, there is no  
15    substance in the letter to which we have not responded  
16    and it preceded the date on which the Bellwether  
17    selections were made.

18            Frankly, we thought that if the defendants  
19    felt that there were strong reasons why these  
20    plaintiffs should be dismissed they would have selected  
21    these plaintiffs as their three choices, so that the  
22    plaintiffs could then proceed through CMO-15, which  
23    governs the Bellwether process.

24            The Bellwether process governs the  
25    commencement of case specific discovery and the

1 depositions and the selection of -- acquiring of all of  
2 the medical records, et cetera.

3 I mean, what we were confronted with the  
4 April 7 letter was simply a request, please dismiss  
5 these plaintiffs and no other explanation. These  
6 plaintiffs did not go through any core discovery and  
7 now have not been selected to go through the core  
8 discovery by the defendants as their Bellwether  
9 plaintiffs.

10 The purpose of the Bellwether selection plan  
11 and the core case specific discovery is to enable all  
12 of the parties to develop a full record about the cases  
13 that are selected, which in this case are six, so that  
14 the parties and the Court will be better informed as to  
15 the information about the various cases, whether  
16 dispositive motions may be appropriate with respect to  
17 those specific cases.

18 If you take in the abstract cases that are  
19 not going through that discovery and a motion is going  
20 to be filed, you know, actually the plaintiffs would be  
21 responding with a Rule 56(f) affidavit that we haven't  
22 even had any discovery in the cases, we haven't had  
23 depositions. They are not part of the core discovery  
24 that is permitted by CMO-15.

25 If the suggestion is that the defendants have



1 80 cases of medical records and they now want to file  
2 motions or dispositive motions on a great number of  
3 those, it is going to be a distraction to the mode that  
4 the Court has established for handling the Bellwether  
5 cases. We are going to be moving in different tracks  
6 at the same time, which is completely contrary to all  
7 cases that have adopted a Bellwether process.

8 So, we would encourage the Court not to open  
9 sort of this pandora's box at this time and permit a  
10 separate track of cases to proceed on a dispositive  
11 motion basis where there is no mechanism for any of the  
12 discovery.

13 We would also oppose opening the discovery to  
14 those cases at this point where the Bellwether process  
15 contemplated the work up of six cases fairly  
16 extensively during the period of May 1, which is when  
17 core discovery started through August 1, 2014, which is  
18 I guess approximately four or five months and are six  
19 cases involved which will involve not only the  
20 depositions of the core witnesses, but the Bellwether  
21 order does permit discovery and depositions of the  
22 plaintiff, the spouse, two treating physicians or  
23 healthcare providers per side.

24 So, if you take four or five depositions  
25 times six plaintiffs we're looking at a minimal of 24

1 or 25 depositions occurring over the course of the  
2 summer.

3 So, just in sum, the plaintiffs would oppose  
4 any modification of the Bellwether order, CMO-15, to  
5 permit some parallel track to work up cases. We would  
6 also oppose the filing of dispositive motions on a  
7 scant record at this time. Thank you, Your Honor.

8 THE COURT: Yes. Ms. Jones, I think Mr.  
9 Berman has a good point, that we're talking about  
10 dispositive motions on the basis of the fact sheets,  
11 and I am just wondering what kinds of issues you would  
12 identify on those fact sheets or in those medical  
13 records that would lend themselves to dispositive  
14 motions?

15 MS. C. JONES: Well, I think first of all,  
16 Your Honor, we did not write that letter lightly. My  
17 recollection is that there is a failure to show product  
18 identification in some cases. There is no  
19 documentation of liver injury in some cases.

20 I mean I would have to go back and look at  
21 more specifically the information, but if the  
22 information that we have suggests that there is no  
23 valid claim properly before this Court then certainly  
24 we ought not to be forced to go through discovery on  
25 those cases.

1 In fact, in all candor, I am not intending to  
2 set up a separate track if you will but, in fact, when  
3 Mr. Berman suggests we should have selected these as  
4 Bellwether cases suggests to Your Honor that the whole  
5 purpose of the Bellwether process is to select  
6 plaintiffs who are representative, if you will, of all  
7 of the plaintiffs.

8 THE COURT: I agree with that.

9 MS. C. JONES: -- and, therefore, we would  
10 get information. And where we've got four plaintiffs  
11 that we don't believe have a valid claim, whether it is  
12 because of the statute of limitations or something  
13 else, most courts, most MDL courts would say it is not  
14 appropriate to identify those plaintiffs as Bellwether  
15 plaintiffs because they end up being dismissed after  
16 great judicial expense and result in delay.

17 So, all I am suggesting is that in those  
18 cases that for whatever reason we believe there is no  
19 question of fact that has been demonstrated, and maybe  
20 the way we can do it is to simply send a more detailed  
21 letter and response to the plaintiffs that say these  
22 are the facts on each one of these individual cases,  
23 and if they, in fact, have something that would suggest  
24 that we are wrong we don't file the motion. But, I  
25 don't think it is necessary at this point, and we

1 certainly were not contemplating in these cases  
2 additional discovery would be necessary.

3 In fact, we wouldn't have asked them to  
4 voluntarily dismiss the cases had we thought that was  
5 necessary.

6 THE COURT: Okay. So, there are some cases,  
7 then where with the limited information available to  
8 you, these plaintiffs' fact sheets and some medical  
9 records that you have either statute of limitations or  
10 product identification or some other clear reason to  
11 seek their dismissal?

12 MS. C. JONES: That's correct, Your Honor.

13 THE COURT: Okay. All right. What is gained  
14 by doing that now and not waiting until later in the  
15 case?

16 MS. C. JONES: What is gained by doing that  
17 now is that we then know or begin to identify what the  
18 proper pool of plaintiffs is in this case, excuse me,  
19 this MDL proceeding, and we begin to eliminate those  
20 cases who are not properly before the Court.

21 THE COURT: All right. Okay. Would it be --  
22 just trying to think through this, but if you file such  
23 a motion would it be a legitimate response from the PSC  
24 that there is a need for additional discovery as to  
25 this particular plaintiff, whoever that is?

1 MS. C. JONES: Let me say this, Your Honor.  
2 We anticipate that based upon the information that we  
3 have there is no genuine issue of material fact.

4 THE COURT: Okay.

5 MS. C. JONES: So, there would be no reason  
6 for the plaintiffs to say we need additional discovery.  
7 If, in fact -- I mean these are the types of  
8 information that you would have expected plaintiffs to  
9 have at the time they filed the lawsuit.

10 If, in fact, they have information that we  
11 don't have, if for example they have some information  
12 that's --

13 THE COURT: And that comes out in the  
14 response.

15 MS. C. JONES: It comes out in the response  
16 or they just won't call us and say Christy, you know,  
17 we've got right here in this piece of paper  
18 documentation of product ID, I would be glad to send it  
19 to you, then we won't file it. That's not -- I am  
20 not -- I don't want -- I don't want the Court to have  
21 to go through anything unnecessarily --

22 THE COURT: Right.

23 MS. C. JONES: -- nor do I want -- you know,  
24 if these are not ironclad cases and the plaintiffs  
25 have, in fact, can say to us we have misunderstood or

1 we missed some fact or something then, you know, we're  
2 happy either not to file the motion or to withdraw the  
3 motion or to defer it pending additional discovery.

4 THE COURT: Okay. I think in theory I am  
5 inclined to let that process go forward, to have you  
6 seek dismissal of those cases where on the basis of the  
7 plaintiff fact sheets and medical records you think  
8 that there is no viable claim.

9 Maybe the thing to do is to, as you  
10 suggested, send a more detailed letter with the reasons  
11 that you would seek the dismissal of those plaintiffs  
12 and see if you can get some agreement as to some of  
13 them.

14 MS. C. JONES: I would be happy to do that,  
15 Your Honor.

16 THE COURT: I think the goal of pairing down  
17 the universe of plaintiffs is a good one. I don't see  
18 any reason to wait to do that. Okay.

19 MS. C. JONES: We would be happy to do that.

20 THE COURT: All right.

21 MS. C. JONES: Thank you, Your Honor.

22 THE COURT: Thank you, Your Honor.

23 MR. BERMAN: Your Honor, if I may just  
24 respond one more time on the issue? I understand your  
25 ruling. We do fear a slippery slope being created here

1 and requiring opening up discovery for all of these  
2 cases.

3 Certainly if there are a very small selection  
4 of cases that Ms. Jones has identified, that she feels  
5 warrants this kind of relief we can take a look at  
6 that.

7 But, we really do not want to waive that  
8 right subject to CMO-15, nor any rights with respect to  
9 opposing motions and requesting full discovery, and we  
10 don't want to go on a slippery slope of having to  
11 embark in extensive discovery to deal with these  
12 motions if they're filed.

13 THE COURT: Well, I don't hear that this is a  
14 request for additional discovery on cases that the  
15 defense has identified as --

16 MR. BERMAN: It is not so much as their  
17 request for discovery, it is what the plaintiffs would  
18 have to do in terms of the discovery they would respond  
19 with in order to oppose the motion.

20 THE COURT: Right.

21 MR. BERMAN: So, if the record is scant and  
22 the plaintiffs need to develop a more elaborate record  
23 in order to respond to the motion that becomes the  
24 slippery slope and a dilution of effort and  
25 concentration of how this has been established, Your

1 Honor.

2 Again, I do go back and I apologize for  
3 saying this. The original letter was very ambiguous in  
4 saying that the plaintiff did not use or at best did  
5 not suffer an injury. And we don't even really know  
6 what that means in terms of the request to dismiss the  
7 four plaintiffs.

8 THE COURT: Well, I think you are going to  
9 get some clarification.

10 MR. BERMAN: Yes, Your Honor.

11 THE COURT: Okay.

12 (Pause in proceedings.)

13 THE COURT: The next item on the agenda is  
14 the status of the Wye (Ph) case.

15 MR. BERMAN: Your Honor, if you recall, the  
16 plaintiffs had represented Mr. Wye and the estate of  
17 his daughter at a point in time and we had moved for  
18 permission to withdraw as counsel, which the Court  
19 granted. That was by an order dated January 27, 2014,  
20 filed in that specific case which was docket number  
21 12-CV-7260 as document number 29.

22 Subsequent to that we offered to try to  
23 facilitate a voluntary dismissal of the case for the  
24 defendants. Mr. Wye has not been cooperative, has not  
25 responded to us. It is one of the reasons why we have



1 requested permission to withdraw.

2 So, in terms of the ability for us to  
3 facilitate that we have sort of reached the end of the  
4 road. We have contacted him about the possibility of  
5 this case will be dismissed or a motion will be filed,  
6 but we have not gotten any response and there is  
7 nothing more that we're really able to do as best as we  
8 have tried.

9 THE COURT: Okay. So, what do you suggest at  
10 this point?

11 MR. BERMAN: I think the defendants wanted  
12 permission to file a formal motion to dismiss for  
13 failing to provide a fact sheet or maybe on another  
14 basis. I am not sure.

15 We have tried to convey that to Mr. Wye and  
16 told him the case is at risk of being dismissed by a  
17 motion in lieu of doing it voluntarily, but we have no  
18 cooperation from him and I would suggest that  
19 defendants take what action they think is appropriate  
20 under the circumstances.

21 THE COURT: Okay. So, you will file a  
22 motion?

23 MR. JONES: We would be happy to, Your Honor.

24 THE COURT: Okay. All right. Very good,  
25 thank you.

1 (Pause in proceedings.)

2 THE COURT: Item six is the plaintiffs'  
3 steering committee's request for cross-noticing and  
4 coordination with respect to expert's depositions.

5 MR. BERMAN: Yes, Your Honor. And I  
6 apologize, do you prefer me to be at the podium?

7 THE COURT: You're fine right there.

8 MR. BERMAN: All right. Thank you, very  
9 much. As Your Honor is aware, the New Jersey  
10 litigation that is ongoing and the plaintiffs have  
11 recently served expert reports in the New Jersey  
12 litigation.

13 In connection with that we drafted a proposed  
14 order in New Jersey whereby there would be certain  
15 limits on the depositions that the defendants could  
16 take of the generic experts, such that there would not  
17 be a second deposition of the same expert on the same  
18 issues on which he had been previously deposed and only  
19 with respect to any new information that might occur  
20 after the trial of the first case.

21 We desire to have some coordination with  
22 respect to that in terms of the MDL. What I mean by  
23 that is if there is going to be a deposition in New  
24 Jersey of the generic expert we would like it to be  
25 cross-noticed for purposes of the MDL, so that that

1 same expert is not deposed a second time on the very  
2 same report in the MDL when we reach the point of  
3 expert disclosures in the MDL.

4 We haven't yet reached the point of a  
5 proposed order for that in the MDL and an order has not  
6 yet been entered in New Jersey with respect to these  
7 issues. As I said, there was a proposed order and we  
8 have a red line that was returned to us by Ms. Jones.

9 We are going to work with her on the red line  
10 for entry in New Jersey, but we wanted to bring to this  
11 Court's attention the idea that we would also like to  
12 have some coordination to cross-notice things, so we  
13 would have the same protection for the experts and not  
14 have them repeatedly deposed from the same report and  
15 only on new information.

16 THE COURT: Okay. Ms. Jones?

17 MS. C. JONES: I am not sure to what extent  
18 we have a real disagreement. Let me tell you what the  
19 issue may be.

20 THE COURT: Okay.

21 MS. C. JONES: We certainly would agree that  
22 experts who have been cross-examined on a particular  
23 subject ought not to be recross-examined on that same  
24 subject and we are certainly willing to work with  
25 plaintiffs' counsel on that.

1           The issue that is before or that is causing  
2           us some problems is that in the case that is set for  
3           trial in New Jersey it involves a 14 year old with very  
4           specific issues. The generic reports of these experts  
5           address issues far beyond that relevant to that  
6           individual plaintiff.

7           It is unlikely that those experts will be  
8           cross-examined on all of the opinions set forth in  
9           their report, because they're simply not relevant to  
10          the issues before the court in New Jersey at this time.

11          And because we are faced with an early trial  
12          setting it obviously is important to restrict that  
13          cross-examination of those experts at their deposition  
14          to the issues before the Court.

15          THE COURT: Right.

16          MS. C. JONES: So, to the extent that we  
17          address certain issues in those expert depositions, and  
18          I am sure the plaintiffs would agree as to ours,  
19          generically we don't have any intent to go back and  
20          recover plowed ground.

21          On the other hand, if for example there are  
22          issues that are not relevant in the New Jersey case,  
23          such as alcohol for example, or certain labels for  
24          example. then if those issues are important in the  
25          subsequent MDL cases we would anticipate being able to

1 cross-examine the expert witnesses on those issues.

2 Not to redo what has been done before.

3 THE COURT: Right.

4 MS. C. JONES: But, not to be foreclosed from  
5 taking another deposition on the pertinent issues. I  
6 think that's the only real issue that we have.

7 THE COURT: Is there one plaintiff going  
8 forward in New Jersey?

9 MS. C. JONES: Just one plaintiff.

10 THE COURT: And that's a 14 year old?

11 MS. C. JONES: Yes, Your Honor.

12 THE COURT: Okay. All right. I see your  
13 point. I think what we would want to avoid here is  
14 some duplication in the depositions.

15 MS. C. JONES: I understand that. And we're  
16 certainly in agreement with that on both sides, but  
17 what I think is while we may -- while we agree that we  
18 would be foreclosed from recovering the same ground,  
19 the fact is that some of their reports address issues  
20 that are simply irrelevant in this case, and I don't  
21 want to be foreclosed and I am sure plaintiffs don't  
22 want to be foreclosed from redeposing our experts as to  
23 issues that are not explored in the New Jersey  
24 litigation.

25 THE COURT: All right.

1 MS. C. JONES: Or that may be more relevant  
2 to whatever the Bellwether cases are before this Court.

3 THE COURT: Okay. I think under those  
4 circumstances it is hard to fashion a rule today as to  
5 how far you can go in a deposition of an expert  
6 somewhere down the road in this case on the basis of  
7 what happened in the New Jersey litigation this summer.  
8 Right? Mr. Berman?

9 MR. BERMAN: Yes. There have been orders  
10 addressing this issue in other MDLs, and I have for  
11 example, but it has not yet been shared with Ms. Jones,  
12 an order that was entered in the Gatalitti (ph), where  
13 Judge Polster (ph) crafted an accommodation for  
14 redeposing experts who had already been deposed and  
15 with limitations on only as to new opinions that are  
16 offered and requiring a new written report that may be  
17 offered to express the new opinions.

18 I guess the concern that we have here is that  
19 with the immediacy of the New Jersey case coming to  
20 trial we have just provided the dates for the experts  
21 to be deposed.

22 And for example, one expert is scheduled to  
23 be deposed towards the end of this week and there will  
24 be other experts who will be discussed next week and  
25 then the following week.

1           And we wanted to get on the table that those  
2 reports, to the extent they are generic reports, not  
3 the case specific reports, that those generic reports  
4 are broad reports and the defendants, when they depose  
5 those experts on the generic issues, they should not  
6 have an opportunity to go back and redepose on the same  
7 generic issues at a later date if there is no update to  
8 the reports.

9           THE COURT: Can you give me an example of a  
10 generic issue, what you're talking about?

11           MR. BERMAN: The question of the dose of  
12 which acetaminophen causes acute liver failure. If an  
13 expert expresses an opinion, a certain gram dosage and  
14 that is in their generic report, there is an  
15 opportunity to depose, it is clearly on paper in that  
16 report that the defendant can question the expert about  
17 that opinion.

18           Why should the expert be subject to another  
19 deposition later on if he never changes his opinion via  
20 a subsequent or updated report.

21           THE COURT: All right.

22           MR. BERMAN: I mean, there is generic issues  
23 relating to the adequacy of the labeling, the language  
24 of the warning, the type of marketing that was done.  
25 All of these have been expressed thus far in generic

1 reports by the plaintiffs and those reports have four  
2 corners to them and the experts shouldn't be deposed a  
3 second time with the four corner report.

4 THE COURT: What is the product involved in  
5 the New Jersey case?

6 MR. BERMAN: I believe it is a Tylenol Extra  
7 Strength product, Your Honor, the Tylenol Extra  
8 Strength, the 500 milligram.

9 THE COURT: Okay.

10 MR. BERMAN: But, if I may say, the reports  
11 do not necessarily confine themselves to discussing  
12 only Tylenol Extra Strength. They do talk more broadly  
13 about other kinds of Tylenol products.

14 MS. C. JONES: And therein lies the issue,  
15 Your Honor, because these reports deal with issues that  
16 are not at issue in the Lyles (ph) case in New Jersey.

17 THE COURT: Right.

18 MS. C. JONES: For example, they deal with  
19 alcohol or they deal with labels other than the one  
20 that is applicable there. There is no reason at this  
21 point in time for us to cross-examine the witnesses on  
22 all of those extraneous opinions here.

23 THE COURT: It seems to me if we look towards  
24 some, you know, you ask it now or you are precluded  
25 from asking it later or you take the deposition now and



1 you are precluded from asking questions, generic  
2 questions of the expert later, that you're really  
3 promoting a very long deposition of an expert in a case  
4 involving one plaintiff and one product, right?

5 I mean, it seems to me that that forces the  
6 defendant to expand the scope of the deposition beyond  
7 what they really need for this trial.

8 MR. BERMAN: Well, the reports again, as I  
9 said, have four corners to them, Your Honor, and the  
10 witnesses, the expert witnesses may testify, as I  
11 understand them, under New Jersey law, to what's in  
12 their reports.

13 And, you know, they may be subject to a  
14 relevancy objection at the time of trial, but the  
15 reports are written to be the generic reports to be  
16 utilized not only in that one case, but any subsequent  
17 cases that may be tried in New Jersey as well as in the  
18 MDL. And with the time constraint of preparing those  
19 reports for the New Jersey trial they've had to  
20 necessarily be comprehensive.

21 THE COURT: What has Judge Higbee done with  
22 the possible use of the depositions for the upcoming  
23 trial in relation to other pending New Jersey cases?

24 MR. BERMAN: I don't believe she has actually  
25 addressed that yet, Your Honor. And Mr. Buchanan, who

1 cannot speak right now, may be able to shed light when  
2 we open the line later. But, I don't believe she has  
3 addressed that.

4 MS. C. JONES: She has not addressed that,  
5 Your Honor. Frankly, if the plaintiffs' position is as  
6 just stated, you're right, the depositions will be much  
7 longer. It is unlikely that sufficient time has been  
8 set aside for those depositions today and it is  
9 unlikely that we will be able to finish those in time  
10 for the July trial.

11 So, that is a matter that would have to be  
12 raised with the Court if that is going to be their  
13 position.

14 THE COURT: Right. I mean, I think what  
15 you're asking me to do is allow cross-noticing of the  
16 depositions in New Jersey for this case, right?

17 MR. BERMAN: Yes, Your Honor.

18 THE COURT: Okay. And if we do that, then I  
19 think I am really expanding the scope of the deposition  
20 taken in the New Jersey case for use in this case some  
21 time later, and I think that intrudes a bit on the New  
22 Jersey litigation.

23 But, I am not inclined to allow the  
24 cross-noticing. Well, maybe I am using the wrong  
25 terminology. I certainly think going back to where we

1     were ten minutes ago, I think if ground is covered in  
2     the New Jersey case adequately it ought not to be gone  
3     into again a year or two or three from now in this  
4     case. Right?

5             MR. BERMAN: Well, I think that is one  
6     concern we don't believe that there should be a  
7     redeposition of the same questions and issues that are  
8     adequately --

9             THE COURT: I don't think Ms. Jones is  
10    disagreeing with that.

11            MS. C. JONES: I agree with that, Your Honor.

12            THE COURT: Okay.

13            MS. C. JONES: It is just that if, for  
14    example, we don't cover certain issues that aren't  
15    relevant to the New Jersey case I don't want to be  
16    foreclosed about coming back and cross-examining the  
17    witness on that later where they are relevant to the  
18    MDL case.

19            THE COURT: Right. I agree with that. So, I  
20    think you can cross-notice them to the extent that what  
21    is gone into in the New Jersey deposition can be used  
22    in this case, but I don't think that limits the scope  
23    of what they can ask later on of the same expert in  
24    this case.

25            Okay. I think that is just something we will

1 have to take up at a later time. Really, if there is  
2 an expert that is going to be deposed in this case who  
3 was deposed in the New Jersey case, then we have to  
4 talk about the scope of that deposition if you can't  
5 agree to it.

6 MS. SHERRY: Your Honor, Madeline Sherry  
7 for --

8 THE COURT: Yes?

9 MS. SHERRY: May I be heard on this issue?

10 THE COURT: Sure.

11 MS. SHERRY: We're not a party to the  
12 litigation in New Jersey. We haven't been served with  
13 any of the expert reports. We haven't seen the notice  
14 of deposition. We're not planning to participate. We  
15 would like to preserve our rights with respect to the  
16 MDL and be given the opportunity to cross-examine these  
17 generic experts if and when the time comes for the  
18 cases in which we're involved.

19 THE COURT: Okay. I think that makes sense.

20 MR. GOODMAN: Your Honor, Brandon Goodman for  
21 Paragon. Paragon joins fully in the position expressed  
22 by Ms. Sherry on behalf of --

23 THE COURT: Okay. Thank you. I think that  
24 takes care of all of the items except for item one.  
25 This is the agenda item whose name shall not be

1 mentioned. So, we have to adjust the set here and  
2 invite our side table counsel to leave. Thank you very  
3 much for being here.

4 ALL: Thank you, Your Honor.

5 THE COURT: And are we terminating this call  
6 and then recalling back, to be redundant.

7 MR. BERMAN: Yes, Your Honor. I think the  
8 process we established was to terminate this call and  
9 we provided a new call in number that will permit Mr.  
10 Buchanan and Mr. Weinkowitz to be able to participate  
11 through the telephone.

12 THE COURT: Okay.

13 MR. BERMAN: They would be the only two  
14 people participating.

15 THE COURT: Okay. So, let's terminate this  
16 call and we will get them back on the line. Thank you.  
17 Do we need a five minute break, folks, do you want to  
18 take a break? We can do that.

19 MS. C. JONES: I don't think this -- I don't  
20 think our hearing itself will take more than ten  
21 minutes.

22 THE COURT: Okay. Stay put then.

23 (The sealed and impounded portion of the  
24 transcript was not requested to be transcribed.)

25 (The proceedings concluded at 11:06 a.m.)

CERTIFICATION

I, Brad Anders, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

9-19-14  
Date

Brad Anders  
Brad Anders